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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Calling Party Pays Service Option)
in the Commercial Mobile Radio Services)
_____)

WT Docket No. 97-207

**COMMENTS OF SBC COMMUNICATIONS INC.
ON THE NOTICE OF INQUIRY**

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SBC Communications Inc. ("SBC"), on behalf of its wireline and wireless subsidiaries,¹ submits these Comments on the Commission's *Notice of Inquiry* ("NOI") in the above-captioned proceeding. The Commission seeks to determine whether there are actions it could take to promote wider availability of Calling Party Pays ("CPP") and whether wider availability of CPP would increase local exchange competition.² As explained in these Comments, the Commission lacks authority to establish requirements for CPP arrangements and, in any event, the Commission should allow the marketplace to determine the value, or lack of value, of CPP.

¹ SBC's wireline subsidiaries are Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell. SBC's wireless subsidiaries are Southwestern Bell Mobile Systems, Inc., Southwestern Bell Wireless Inc., and Pacific Bell Mobile Services.

² NOI at para. 1.

I. SUMMARY AND INTRODUCTION

The Commission should not open a rulemaking proceeding concerning CPP, for a number of reasons. First, the Commission lacks the authority to establish requirements for CPP arrangements between local exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers. Section 332 of the Communications Act does not provide the Commission with authority over "other terms and conditions" of local CMRS, such as the CPP billing option.

Second, imposing regulatory requirements would be contrary to the deregulatory goals both of the Telecommunications Act of 1996 ("1996 Act") and of the Commission itself. Regulation of the CPP billing option would be contrary to the Commission's long-standing decision to deregulate billing and collection in order to allow these services to be offered based on marketplace competition. Consistent with Congress's deregulatory goals in the 1996 Act, the marketplace should determine whether wider availability of CPP would stimulate local competition between wireless and wireline services to the benefit of consumers.

Third, industry experience shows that there has been only limited and selective acceptance of CPP in the United States for market-driven reasons that include calling parties' unwillingness to pay per-minute charges for originating local calls that terminate on wireless networks, as well as technical and practical implementation problems. The international experience with CPP is not indicative of demand for CPP in the United States. Unlike in the United States, in countries where CPP is successful, telephone subscribers are accustomed to paying per-minute charges for every call and, in many cases, wireline service is difficult to obtain, making wireless a necessary substitute.

Finally, if the Commission does open a rulemaking proceeding with a proposed mandate for CPP, it also should propose that strict consumer protections be implemented to ensure that calling parties know they are being charged for each call to CMRS end-users and the amount of the charges. As a matter of law and policy, however, the proper approach is for the Commission to stay clear of CPP and let the competitive market perform.

II. THE COMMISSION LACKS AUTHORITY TO ESTABLISH REQUIREMENTS FOR CPP ARRANGEMENTS BETWEEN LECs AND CMRS PROVIDERS

In the NOI, the Commission states:

In light of the *Local Competition First Report and Order* and the *Iowa Utilities Board* decision, we seek comment regarding the scope of our authority to require LECs to provide billing information and services which will enable CMRS providers to offer CPP services. Specifically, we seek comment on whether we have authority under Section 332 to establish requirements regarding CPP arrangements between LECs and CMRS carriers.³

Section 332 of the Act does not provide the Commission with authority to establish requirements regarding CPP arrangements. The Commission considered this issue in the *Arizona Decision* and correctly decided that CPP is a billing practice, which Section 332(c)(3) does not prohibit a state from regulating as "other terms and conditions," not rates, of commercial mobile services.⁴ Determining which end-user

³ *Id.* at para. 29.

⁴ *Petition of Arizona Corporation Commission To Extend State Authority Over Rate and Entry Regulation*, PR Docket No. 94-104 and GN Docket No. 93-252, *Report and Order*, 10 FCC Rcd 7824, 7837 (1996) ("*Arizona Decision*").

pays for a call and obtaining payment is indeed a billing and collection matter. Billing and collection services are administrative services, not telecommunications services.⁵

The Commission detariffed and deregulated billing and collection for interstate services eleven years ago in order to “enhance competition in the billing and collection market....”⁶ There is no reason to reverse this deregulatory approach. In fact, the Commission has acknowledged repeatedly that the intent of the 1996 Act is “to provide for a pro-competitive, deregulatory national policy framework....”⁷ Moreover, the Commission never had authority over, attempted to preempt, or had any legal basis to preempt billing and collection for intrastate services, including local, intrastate CMRS to which CPP is applied.

Regulation of this local exchange matter would be outside the scope of the Commission’s authority. Nothing in the 1996 Act gives the Commission the authority to require CPP. The 1996 Act carefully lays out the obligations of telecommunications carriers in general, and of LECs and incumbent LECs in particular.⁸ CMRS carriers can provide CPP using their own networks and information that incumbent LECs currently make available. Under the 1996 Act, incumbent LECs must provide other carriers with access to unbundled network elements, which includes access to “information sufficient

⁵ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket 96-149, *Notice of Proposed Rulemaking (“NPRM”)*, 11 FCC Rcd 18877 (1996) (“*Non-Accounting Safeguards NPRM*”), *First Report and Order*, 11 FCC Rcd 21905 at para. 217 (1996) (“*Non-Accounting Safeguards Order*”).

⁶ *Detariffing of Billing and Collection Services, Report and Order*, 102 FCC 2nd 1150 at para. 38 (1986) (“*Detariffing Order*”).

⁷ See, e.g., *Non-Accounting Safeguards NPRM* at para. 1.

⁸ 47 U.S.C. 251.

for billing and collection” – in this case, billing name and address (“BNA”).⁹ With this information, CMRS carriers can bill customers themselves. The House Report on Section 332 lists “customer billing information and practices and billing disputes and other consumer protection matters” as being among the many matters that fall within the “other terms and conditions of CMRS services” that remain under State authority.¹⁰ The 1996 Act does not require that incumbent LECs provide billing and collection services.

Even if CPP were a “telecommunication service,” regulation would not be appropriate. The 1996 Act favors marketplace solutions to the provision of such services, with negotiation favored over regulation, and with arbitration and enforcement as necessary, all under the auspices of State commissions.¹¹

The Commission’s and the Eighth Circuit’s *Local Competition* decisions do not change these conclusions. In *Iowa Utilities Board*, the Eighth Circuit left in place certain of the pricing rules the Commission had established in the *Local Competition First Report and Order*, only as they applied to CMRS providers. The Court stated in footnote 21 of its Opinion:

Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers, see 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers, *i.e.*, 47 C.F.R.

⁹ 47 U.S.C. § 153(29).

¹⁰ H.R. Rep. No. 103-111, at 261 (1993).

¹¹ *Non-Accounting Safeguards Order* at para. 1, quoting Conference Report, and 47 U.S.C. § 252.

§§ 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as these provisions apply to CMRS providers.¹²

Accordingly, based on these two subsections of Section 332, the Court retained only the Commission's rules establishing general requirements (e.g., the requirement for reciprocal compensation) for transport and termination between LECs and CMRS providers. None of the retained rules have anything to do with rates, terms, or conditions applicable to end-users, and certainly nothing to do with billing and collection, and provide no basis for any assertion of authority to order that CPP be provided by any carrier, incumbent LECs included.

In summary, the Commission lacks any authority to determine what billing options, such as CPP, might be "good" and to require that LECs provide those options to CMRS carriers. As a matter of policy and law, the Commission should continue to allow the competitive marketplace to make these determinations.¹³ In this proceeding,

¹² *Iowa Utilities Bd. V. F.C.C.*, 120 F.3d 753 (8th Cir., July 18, 1997) ("*Eighth Circuit Interconnection Opinion*").

¹³ Mandating CPP only for one segment of the industry would skew the competitive market and undermine the Commission's stated goal to "minimize distinctions between telephony service provided on wireline and wireless networks." *NOI*, at para. 18. Even if the Commission has the authority to order that CPP be made available to the wireless industry – which, as discussed above, it clearly does not – mandating CPP would create a quagmire given the different federal and state regulatory responsibilities under the Act. See, e.g., *Eighth Circuit Interconnection Opinion* at n. 21. As a result, mandating CPP would thwart, not increase, competition for local services. The Commission would have to ensure that CPP would be provided in a manner consistent with state and federal regulatory goals, including universal service. It would be better for the FCC to allow the competitive marketplace to determine the availability of CPP than to mandate CPP for only one industry segment.

the Commission should view CPP for what it is—another possible billing option that a wireless carrier and a LEC may decide to pursue.

III. THE MARKETPLACE SHOULD DETERMINE WHETHER WIDER AVAILABILITY OF CALLING PARTY PAYS WOULD STIMULATE LOCAL COMPETITION BETWEEN WIRELESS AND WIRELINE SERVICES

The *NOI* itself reveals uncertainty as to whether wider availability of CPP would depress or stimulate use of CMRS and whether CPP would decrease or increase competition with landline services. Although several carriers have offered CPP, the results are inconclusive at best.¹⁴ This uncertainty is not surprising. There are numerous factors that affect a customer's choice, and the Commission should not attempt to isolate one factor and require one option, such as CPP. Only the competitive marketplace can balance all the factors and options and determine whether certain options are economical for parties to pursue. If there is sufficient market demand and if technological and practical obstacles can be overcome, the option will be made available without any Commission action.

Moreover, availability of CPP can develop based on the market conditions of individual States, without national uniformity. For instance, as international experience shows, CPP is likely to be more successful in States where measured, rather than flat-rate, local service is widespread and where, as a result, landline telephone customers are accustomed to paying additional per-minute charges for originating local calls. In such States, CPP is more likely to be readily accepted by calling parties, and the lack of

¹⁴ *NOI* at paras. 11-12 and 18.

consumer awareness that charges exist is less of a concern, than in States where most customers may never have paid a usage charge to make a local call.

CPP will not make wireless service a closer substitute for wireline service. What affects wireless service's substitutability for wireline service is not limited to who pays, but instead depends upon many factors not the least of which is price. With CMRS, a per-minute charge is typically imposed on all "airtime" minutes, regardless of who initiated the call.¹⁵ While CMRS customers are accustomed to paying a premium for the benefits of mobility, charging calling parties, most of whom are accustomed to flat-rate local calling, almost certainly will restrain usage.

Thus, the public interest and the law are in sync; the marketplace can and will work without additional regulations. The Commission should not try to determine what billing options, such as CPP, might be good for particular classes of carriers and then require that those options be made available. The Commission should, and legally must, continue to allow the competitive marketplace to make these determinations.

This marketplace is working. As indicated in the *NOI*, the CMRS industry is experimenting not only with CPP but also with other options to try to increase landline to CMRS traffic, including the provision of the first minute of such calls free to CMRS subscribers.¹⁶ The CMRS industry is constantly bringing new features, services, and capabilities to the market. These innovations are a result of competition, not regulation.

¹⁵ Depending on who has to pay the charge, the called or the calling party, this charge constitutes either a disincentive to receive calls or a disincentive to place calls that terminate on wireless networks. To the extent that this disincentive restrains usage and wireless carriers want to address the issue, they have with "free incoming calls" and by offering caller ID.

¹⁶ *NOI* at para. 8.

In California, for instance, Pacific Bell Mobile Services ("PBMS") is currently offering its Personal Communications Service ("PCS") customers access to such features as "first-minute-free" on incoming calls, and voice mail and caller ID at no additional charge. These features are proving to be attractive competitive offerings, and PBMS is satisfied with the balance of calls and the minutes-of-use. We believe that some incumbent cellular carriers are advocating mandated CPP in order to undercut competitive offerings, without having to respond in the marketplace. CPP may be more attractive between incumbent cellular carriers with embedded bases of customers who are accustomed to paying for the first minute-of-use and additional features. It would not, however, make sense for the FCC to undercut competitive options that can allow PCS providers to compete with the incumbent cellular carriers, under the guise of mandating CPP.¹⁷ Indeed, such a mandate would be anticompetitive and especially harmful to the ability of new entrants such as PBMS to meet the marketplace and benefit consumers, contrary to the Commission's goals when it created PCS.¹⁸ Where a SBC Company is the cellular carrier, we are quite willing to compete in the marketplace without the intervention of the Commission.

In summary, the market is adjusting in the appropriate manner, and no federal intervention is needed. Accordingly, the Commission should not attempt to mandate CPP and should not conduct a rulemaking proceeding on CPP.

¹⁷ If the Commission adopts CPP, which we believe it is without authority to do, CPP needs to be implemented equitably between all networks.

¹⁸ See, e.g., *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4959 at para. 3.

IV. THERE ARE GOOD REASONS FOR THE LIMITED AND SELECTIVE MARKET ACCEPTANCE OF CPP

A. SBC's Experience With CPP Demonstrates Numerous Practical And Technological Problems And The Need For Negotiation, Not Regulation

SBC's experience with CPP in Chicago has been fraught with problems related to "leakage," or the inability of the CMRS provider to be compensated for all calls. Leakage is caused by the inability to match the specific calling party to a billing address, or the lack of a mechanism for billing the customer (e.g., the end-user of a payphone).

Illinois Bell, an incumbent local exchange carrier that serves Chicago, has been offering a CPP option to CMRS providers since August, 1995.¹⁹ Cellular One, the SBC cellular affiliate in Chicago, began offering CPP under a trial billing and collection agreement with Illinois Bell, but experienced "leakage" on which Cellular One could not collect usage in excess of 40% of the CPP minutes-of-use.²⁰ Cellular One entered into a new billing and collection agreement with Illinois Bell which attempted to allocate the risk of loss of the CMRS provider's "unbillables" due to leakage. The continuing

¹⁹ Chicago is a prime area for testing CPP because Illinois Bell customers, unlike most customers of incumbent LECs in the United States, are accustomed to paying per-minute charges for originating local calls. Therefore, consumer acceptance of CPP should be expected to be higher in Chicago than in most areas of the United States.

²⁰ The "leakage" occurs on a wide variety of calls, including: calls from hotel, motel, or hospital telephones; calls from public and semi-public coin payphones; interLATA calls, including 10XXX or other calls dialed using a carrier access code or equivalent; calls from WATS service; calls from international phone companies; calls from lines equipped with pay-per-call blocking; and calls from any domestic phone company, including the rapidly proliferating competing LECs ("CLECs"), or from other wireless companies.

leakage losses, however, rendered the service untenable even with such allocation.

Thus, Cellular One is no longer offering CPP to its new customers, although it is continuing to explore with Illinois Bell ways to address the "leakage" problem.²¹

SBC's experience in Illinois provides important lessons regarding CPP. First, it shows that there are significant practical and technical implementation problems associated with CPP. Determining whether CPP can work from practical and technical standpoints is a necessary prerequisite to any presumptions regarding the potential value of the service option. Second, the Chicago experience shows that the best way to attempt to resolve issues and problems associated with CPP is through discussions between carriers. The attempted re-allocation of risk of loss from "unbillables," something which could not have been mandated by regulatory fiat, was negotiated between the carriers. With the addition of more local exchange providers, there will be greater potential for leakage, and negotiations will be of even more critical importance.

B. CPP Will Not Stimulate, And May Depress, Demand For Wireless Service

Claims that CPP might stimulate demand for wireless services,²² and might even accelerate the rate at which wireless services are accepted as close substitutes for wireline services²³ are, at best, highly speculative. The largest influence over a

²¹ The discussions have included possibly sending identifiable leakage traffic to a third party credit card billing service along with some of the other methods described in the *CTIA White Paper*, "The Who, What and Why of 'Calling Party Pays'," June 4, 1997, p. 22. The costs associated with such "fixes" to capture leakage, however, raise concerns about whether the service would be priced beyond callers' willingness to pay – yet another reason why the Commission should not mandate CPP.

²² *NOI* at para. 10.

²³ *Id.* at para. 2.

customer's choice between wireless and wireline local services is the difference in price as compared to the value of mobility. While CPP might influence wireless customers to more freely give out their mobile numbers, such distribution does not automatically equate to more calls completed to the wireless customer. These calls will increase as a result of CPP only if calling parties are willing to pay additional charges to make calls to wireless customers. As the Commission pointed out, "In general, wireline telephone subscribers in the United States pay a flat rate for unlimited calling within a local service area...."²⁴ Thus, paying an additional charge to complete a local call is a foreign experience to the majority of wireline service consumers in the United States. See Section C below. As a result, the possibility of CPP causing a significant impact in the balance of traffic and causing a wider acceptance of wireless service as a substitute for wireline service is very low. SBC's experience in Chicago does not support the possibility of such an impact or of such wider acceptance of wireless service resulting from CPP.

In fact, CPP could reduce the number of wireline-originated calls terminated on wireless networks. Simply put, imposing a per-minute charge on calling parties for calls to wireless customers could reduce calls to wireless customers. Moreover, a caller left to speculate as to whether or not an additional charge is associated with a call is much less likely to place the call.²⁵

²⁴ *Id.* at para. 15.

²⁵ A caller needs to be aware that there is a charge, and the magnitude of the charge, associated with the call. Ensuring this awareness is particularly important in areas where most customers have flat-rate local service. We discuss this and other consumer safeguards in Part VI of these Comments.

As previously noted, resolution of technical and practical implementation issues, including leakage, is necessary before many wireless carriers will find it worthwhile to offer CPP. The inability to bill all calls affects the economic viability of CPP and thus lessens the attractiveness of CPP to the carrier. Similarly, the inability to bill all calls may result in a higher charge for calls which can be billed, making CPP less attractive to calling parties. One alternative suggested is to bill any calls that cannot be billed to the landline calling party to the wireless customer.²⁶ Billing the wireless customer for the "leaked" calls, however, merely lessens wireless customer satisfaction with and, ultimately, acceptance of CPP. The effects on demand of these factors can best be weighed by the competitive market.

C. The International Experience With CPP Is Not Indicative Of Demand For CPP In The United States

The *NOI* states that "[o]utside the United States, CPP seems to be the prevalent billing system for mobile telephony...."²⁷ This observation may be correct as to some countries, but the attractiveness of CPP can be attributed to certain factors. These factors include the inability to obtain landline service on a timely basis, making wireless service a substitute. For instance, concerning Venezuela, Radio Communications Report stated:

To help facilitate cellular use as a personal communications tool, Movilnet offers a special rate plan under which subscribers pay a relatively low monthly fee. And that,

²⁶ *CTIA White Paper*, p. 22. This option has its own substantial difficulties. SBC's wireless companies do not relish the idea of attempting to market a "Sometimes Calling Party Pays." Such an offering could only result in confusion and ultimate customer dissatisfaction.

²⁷ *NOI* at para. 6.

together with calling party pays, makes cellular particularly attractive for personal use.

'The people are using that phone almost only to receive calls, and they don't pay for those calls,' said Felix Ohep, vice president of systems for Movilnet. 'They only pay a monthly fee.' This type of tariffing structure has allowed customers such as apartment and condominium dwellers -- who could get wireline service if they were willing to wait long enough -- to buy a cellular phone and use it instead of traditional phone service.²⁸

This experience in Venezuela is hardly a model for the United States. This experience shows that the success of CPP in other countries, grounded on entirely different telecommunications markets than exist in the United States, is not an indicator of the potential for CPP here. The Venezuela example shows that CPP can help make wireless service a practical substitute for wireline service in countries where wireline service is difficult to get and for people who could not otherwise afford wireless service, if they "almost only receive calls." In fact, in Colombia, CPP "has allowed new products and services" such as "CelluBeeper service...[which] provides customers a cellular phone that can receive calls only and cannot initiate them."²⁹ Thus, the attractiveness of CPP in certain other countries, which is a result of the peculiar circumstances of those countries, does not mean it will be attractive to consumers in the United States.

²⁸ "Calling Party Pays Raises Cellular Use, Say Carriers," Crain Communications Inc., Radio Communications Report, February 5, 1996 (emphasis added).

²⁹ *Id.* In most countries that have CPP, the wireline originated calls terminating to wireless subscribers are more expensive than calls terminating on other wireline phones. The price differential reduces the potential for wireless to truly substitute for, and compete with, wireline service. If the CPP per minute charge is much less than the normal airtime rates, a major incentive will exist to not originate wireless calls, but only to receive them. This effect could lower total wireless minutes of use.

The attractiveness of CPP in other countries largely also can be attributed to the prevalence there of measured local landline service with billing on a minute-of-use basis. Because consumers in those countries already are accustomed to paying additional charges for every call they place, CPP is not a major change for them. For instance, a vice president for Celumovil, which operates in Colombia, was quoted as saying, "The big benefit from calling party pays...from the users' point of view...is the great similarity to conventional fixed telephones."³⁰

That is not generally the case in the United States, where most landline service consumers subscribe to flat-rate local service for which they pay no additional charges for originating local calls.³¹ Even in those areas where measured landline service is offered as an option to flat-rate service, few consumers subscribe to the measured service. Moreover, where measured landline service is offered, it is at much lower rates than CMRS, since the local landline service does not bring with it the added value of mobility. In areas where local measured service is available, only approximately 2% of SWBT's residence customers in five States, 13% of Pacific Bell's residence customers in California, and 3.15% of Nevada Bell's residence customers in Nevada subscribe to it, even though it is low priced. (For example, Pacific Bell charges \$6 per month plus a day-rate of .0333 cent for the first minute and .0105 cent for each additional minute.)³²

³⁰ *Id.*

³¹ See *NOI* at paras. 15 and 17 and n. 22.

³² Pacific Bell's evening rate is .0233 cent for the first minute and .0073 cent for each additional minute. Pacific Bell's night and weekend rate is .0133 cent for the first minute and .0042 cent for each additional minute.

The rest of the residential customers in SBC's seven state landline service territory (Arkansas, California, Kansas, Missouri, Nevada, Oklahoma, and Texas) have flat-rate local service. Because of this experience in most parts of the United States,³³ without advance warning, consumers of landline service would be extremely reluctant to pay a minute-of-use charge to place local calls to wireless networks. The distinction between "no additional charge" local calls and paying for each additional local call on a time-sensitive basis is a distinction that makes a substantial difference, and makes the experience in other countries inapplicable to what could be expected to be the experience with CPP in the United States.

V. CPP IS A BILLING OPTION FOR CMRS PROVIDERS, AND LECs CAN ONLY OFFER TO BILL AND COLLECT FOR IT PURSUANT TO NEGOTIATED AGREEMENTS

CPP depends upon creation of a contractual relationship between the wireless provider and the calling party. A LEC's involvement is limited, at most, to providing BNA or, as agreed between the LEC and the CMRS provider, billing and collection. SBC's wireline subsidiaries provide BNA today so that carriers can bill their charges, but at this point do not provide billing and collection for CPP. LECs would consider many business concerns in determining whether or not to provide CMRS carriers a CPP billing and collection option. LECs would likely balance the revenue expected from charges for billing and collection compared to the costs, responsibilities, and effects on LEC customers from billing and collecting for CPP. LECs would be likely to consider the burdens of notifying their customers that they were billing and collecting for

³³ See *NOI* at paras. 15 and 17 and n. 22.

CPP, which would be expensive and would risk confusing LEC customers about a service not provided by the LEC. LECs would also have to train their service representatives to answer questions that end-users are likely to ask about the charges. Moreover, LECs would have to decide where to place the charges on the bill, which could require coordination and compliance with State commissions' directions.

In the negotiations, the LECs would consider that the amount billed on the LEC customers' local phone bills will go up if the LECs bill for CPP. Given the charges for wireless service as compared to local or even long distance service, the increase in the bills could be substantial. Customers could attribute that increase to the billing LEC, not differentiating between local service charges and CPP charges on their bills. In any event, customers may react to increased bills by cutting back on services offered by the LEC (e.g., decreasing the number and length of toll calls) that they otherwise would purchase.

These issues must be addressed on a company-specific negotiated basis. Accordingly, the issues are not amenable to broad-based federal regulation, even if the FCC had the jurisdiction to regulate in this area.

Alternatives exist for the billing and collection of CPP. Using an SS7-based billing system, for instance, the CMRS provider can obtain the calling party's number and use it to purchase BNA from the LEC via tariffed charges or under an interconnection agreement. The CMRS providers can then bill for CPP themselves or hire another company to do the billing for them.³⁴ Accordingly, LECs' billing and

³⁴ A tariff likely would be required for the CMRS provider or its agent to bill the LEC customers.

collecting for CPP is only one alternative, and should be left to negotiations between LECs and CMRS providers.

VI. IF THE FCC CONSIDERS CPP REGULATION, IT SHOULD RECOGNIZE THAT A CMRS PROVIDER THAT OFFERS CPP MUST BE HELD RESPONSIBLE FOR INFORMING CALLING PARTIES OF THE CHARGES AND MUST RECEIVE AFFIRMATIVE CONSENT FROM THE CALLING PARTIES

CPP is based on the imposition of service charges on calling parties. The consumers' degree of exposure to such charges (*e.g.*, measured versus flat-rate service) varies from State to State. As a result, the consumers' degree of sensitivity to charges is likely to differ from State to State. Accordingly, like CPP requirements in general, consumer protections should be left to individual negotiations of the carriers, who must compete to provide services that are desirable to consumers.³⁵ Nonetheless, in this part, we respond to the Commission's request for comments on how the calling party can best be informed of charges to CMRS phones and how a binding contractual agreement can be created.³⁶

The duty of informing calling parties that they will be charged for calls to CMRS subscribers is particularly important because (1) most calling parties in the United States have flat-rate local wireline service and do not expect to incur additional charges when they make local calls,³⁷ (2) CMRS prices are generally higher than usage-sensitive local or long distance wireline service prices, and (3) calling parties are

³⁵ In addition, as discussed in Part II of these Comments, the Commission lacks authority to establish requirements for CPP.

³⁶ *NOI* at para. 21.

³⁷ See *NOI* at paras. 15 and 17 and n. 22.

generally calling mobile phones today at no charge to them. The responsibility for providing the recorded announcement should belong to the CMRS provider. The CMRS provider may provide the message via its own switch and its own Advanced Intelligent Network ("AIN"), via an agreement with a third party AIN provider, or via an agreement with the LEC, if the LEC chooses to be in that business. For example, in Chicago, Illinois Bell handles the announcement for a fee.

The Commission has dealt with the issue of informing customers of charges in a number of contexts, including: pay per call and other information services;³⁸ casual calling using non-presubscribed IXCs;³⁹ and operator services related to "billed party preference."⁴⁰ These other contexts are instructive concerning how the industry should proceed with CPP.

In many of the other contexts, the calling party has some indication that extra charges will, or may, be incurred, based on the prefix numbers dialed. For instance, the calling party dials "900" for interstate pay per call services, 10XXX for casual calls to non-presubscribed IXCs, and 0+ for operator assisted calls. With CPP, there is no

³⁸ *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, *Order on Reconsideration and Further NPRM*, 9 FCC Rcd 6891 (1994) ("Pay-Per-Call Recon. Order").

³⁹ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Order on Reconsideration*, released August 20, 1997 ("Casual Calling Recon. Order"). CMRS providers would be in the same relationship with the calling party as an IXC is when a customer dials 10XXX to access an IXC not chosen on that calling party's PIC.

⁴⁰ *Billed Party Preference for InterLATA 0+ Calls*, CC Docket NO. 92-77, *Second Further Notice Of Proposed Rulemaking*, 11 FCC Rcd 7274, 7277, 7283, 7303 (1996) ("Billed Party Preference NPRM").

special number that designates the calls, and thus no actual or constructive notice is automatically provided to calling parties. The Commission previously pointed out some of the problems of trying to apply number designations to intrastate calls in the pay-per-call proceeding. The Commission there stated, "The Commenters have convinced us that the technical difficulties and potential disruption to the pay-per-call industry likely to accompany any federal requirements for numbering of intrastate pay-per-call services outweigh any benefit that a detailed number designation system would offer to consumers."⁴¹ The same would be true for CMRS.⁴² Rather than number designations, for CPP an up-front oral disclosure of charges and the ability for calling parties to then avoid the charges are essential.

Although in some other contexts the Commission has determined that the disclosure may not be needed on all calls, it would be needed for an indefinite period of time for CPP calls. For example, in the billed party preference proceeding, the Commission proposed that disclosure be provided only where charges exceed certain benchmarks.⁴³ With CPP, however, a disclosure message is needed on all calls because most calling parties will not expect to pay any additional charges.

⁴¹ *Pay-Per-Call Recon. Order* at para 48.

⁴² Given the large number of wireless users (cellular users alone number approximately 45 million) it would not be possible to assign a specific NXX, as has been done for "900" numbers.

⁴³ *Billed Party Preference NPRM* at para. 53.

In addition to informing the calling party of charges, an oral message, such as a recording, can help create a legally enforceable obligation. In the context of casual calling, the Commission found:

[P]roviding the rates, terms, and conditions prior to completion of the call would establish an enforceable contract....' [I]f the customer has used the carrier's service with knowledge of the rates, terms, and conditions, nondominant interexchange carriers could seek recovery under an implied-in-fact contract theory. [T]he fact that a casual caller has not signed a written contract does not preclude a finding that a legally enforceable obligation exists..., especially when the customer has knowledge of the carrier's charges.⁴⁴

Given that the calling party does not dial a special number for CPP, ensuring customer awareness and creating a binding obligation for CPP requires an affirmative response from the calling party. This can be accomplished by having a recording of charges that ends with an instruction that to complete the call the calling party must hit a certain key, such as "1."⁴⁵ That is the approach used in Chicago. The California PUC approved a CPP market trial by AirTouch in which the recorded preamble would provide a range of rates, so that AirTouch would not have to continually change the recording, and a statement that:

either (1) the landline customer has six seconds after completion of the preamble to hang up before the call to the cellular customer is completed, or (2) the call to the cellular customer will not be completed unless the landline customer

⁴⁴ *Casual Calling Recon. Order* at para. 28.

⁴⁵ Unless the customer provides this affirmative response, the CMRS carrier should not be permitted to charge the LEC for transport and termination of the call.

indicates a willingness to pay the cellular airtime charges by pressing a digit in response to a prompt.⁴⁶

Another means of affirmative response is set forth in § 64.1504 of the Commission's Rules in the context of restrictions on the use of toll-free numbers where the calling party is charged for information conveyed during the call. As with CPP, the concern there is that it is widely understood by calling parties that 800 and certain other numbers are toll free, and thus the calling party is not warned by the number dialed that charges will result. Rule 64.1504 requires not only that charges be explained but that a credit, prepaid, debit, charge or calling card number be required for payment before the call is completed. The calling party's provision of the card number, together with failure to hang up at or before the end of the message, provides the affirmative act to show customer awareness and create an enforceable obligation.

Requiring payment in this manner is one means to ensure that the party that actually transacts business with the wireless carrier pays for the call, rather than having it charged to the subscribing party. "[A] caller cannot legally establish an arrangement that binds another party – the subscriber to the originating line – to terms and conditions unknown to and unaccepted by that party."⁴⁷ Requiring payment by credit or other card, however, may prove to be cumbersome and is likely to discourage usage. The problem of creating an arrangement that binds the proper party without restricting

⁴⁶ *Investigation on the Commission's Own Motion into the Regulation of Cellular Radiotelephone Utilities*, California PUC, I.88-11-040, *Decision 97-06-109*, June 25, 1997, at p. 7 ("California PUC AirTouch CPP Market Trial Decision").

⁴⁷ *Pay-Per-Call Recon. Order* at para. 19.

the form of payment to credit and other cards is alleviated in the case of services like pay-per-view where the subscriber to the originating line can block all "900" calls or block all such calls where there is no pre-subscription agreement. But absent an ability to block calls to CMRS customers for CPP, unauthorized calls must be addressed.

The California PUC addressed unauthorized calls, for purposes of the approved AirTouch CPP trial, by ordering that cellular airtime charges disputed by a LEC customer be refunded by the LEC (who by agreeing to participate in the trial would be responsible for billing CPP), or reflected in a credit adjustment.⁴⁸ Since the CMRS provider, not the LEC, ultimately receives the airtime charges from the LEC customer, this refund approach requires the CMRS provider to reimburse the LEC in some manner. For instance, the LEC providing billing and collection service for the CMRS carrier could purchase the CMRS carrier's account receivables. If a subscriber complains that he or she did not make the call, the LEC could adjust the call off the subscriber's bill and refer the call back to the CMRS provider to attempt to collect if it wishes.⁴⁹

Whatever approach is used for consumer protection and for creation of a binding obligation for CPP, the responsibilities and authority should be placed on the party that charges the calling party – the CMRS provider. In light of State-by-State differences in consumers' needs for protection concerning CPP and the limitations in various

⁴⁸ *California PUC AirTouch CPP Market Trial Decision* at p. 7.

⁴⁹ As a result of this adjustment, the LEC's future purchase price of the CMRS carrier's accounts receivables would be reduced.